

PRESTON NUTTER CORPORATION

IBLA 76-202

Decided June 21, 1976

Appeal from decision by Director, Bureau of Land Management, rejecting application ES-6310 for cash redemption of Sioux Half-Breed scrip.

Affirmed.

1. Scrip: Payment in Satisfaction--Scrip: Special Types of Scrip--Scrip: Validity

The right to locate Sioux Half-Breed scrip is a personal right not subject to transfer. However, such scrip may be located by an attorney in fact with authority from the scribee (1) to locate the land in the name of the scribee, and (2) to convey that land in the name of the scribee. Where proper documentation of this authority from the scribee is not presented to the Department with an application to receive cash payment for redemption of the scrip under the Act of August 31, 1964, the application is properly rejected.

APPEARANCES: H. Byron Mock, Esq., of Mock, Shearer and Carling, Attorneys at Law, of Salt Lake City, Utah, for appellant.

OPINION BY BY ADMINISTRATIVE JUDGE RITVO

Preston Nutter Corporation has appealed from a decision of the Bureau of Land Management (BLM), dated August 13, 1975, which denied its application ES-6310 for cash redemption of Sioux Half-Breed Scrip Certificate No. 567-E.

Preston Nutter Corporation, as attorney in fact for Josette Montre, originally filed an application with the BLM on August 25, 1969, to receive cash instead of land in satisfaction of Sioux Half-Breed Scrip Certificate 567-E for 160 acres.

Sioux Half-Breed scrip was authorized by the Act of July 17, 1854, 10 Stat. 304. The 1854 Act enabled the President to issue certificates or scrip to eligible Sioux Half-Breed Indians in return for a relinquishment of their rights to public land previously set aside as a reservation in the Minnesota Territory. The Act also specifically provided that no transfer or conveyance of any Sioux Half-Breed certificate would be valid.

The record shows that Nutter Corporation's claim originates from one Josette Montre, a Sioux Half-Breed, who was issued scrip certificate 567-E, enabling her to select 160 acres of public land. The scrip was first unsuccessfully located for patented land by one Anna R. Kean in the name of Josette Montre. 1/ Anna Kean had also obtained an irrevocable power of attorney to convey such land once located. After litigation in the Indiana courts, it was determined in 1913 that Anna Kean was entitled to have the scrip returned to her so that she could make a new selection of land in the name of Josette Montre.

A duplicate certificate 567-E was subsequently issued December 24, 1915, by the Secretary of the Interior in the name of Josette Montre to Anna R. Kean. 2/ Kean at that time executed an irrevocable power of attorney in the name of Josette Montre coupled with an interest to enter and convey lands patented to Josette Montre under certificate 567-E. She also executed an application to locate such lands on behalf of Josette Montre. These two documents, which form the basis for the claim in question, were subsequently delivered in blank to Preston Nutter. After Nutter's death in 1939 his interest in the scrip passed to his heirs and was assigned to Preston Nutter Corporation in 1957.

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1/ In the case of Kean v. Calumet Canal & Improvement Co., 190 U.S. 452 (1903), the Supreme Court held that property located by Kean had actually been conveyed to the State of Indiana in 1855 and was, therefore, not public land for which Sioux Half-Breed scrip rights could be exercised.

2/ The duplicate certificate was issued after the Department, while not recognizing the decree of the Indiana Court, Barney R. Colson (*infra*), held in an opinion of April 29, 1914, D-29200, stating:

"In view of the holding of the Court, it would appear that where a person has purchased and located and patented under this class of scrip and the title has failed because the Government had already disposed of the land such purchaser shall be permitted to govern the use of the scrip for purposes of making a new location. Of course, the new selection would have to be in the name of the scribee as was the former one."

After having recorded scrip certificate 567-E, as required by the Act of August 5, 1955, 69 Stat. 534, 43 U.S.C. @ 274 (note), Preston Nutter Corporation filed its scrip application pursuant to the provisions of the Act of August 31, 1964, 78 Stat. 751, 43 U.S.C. @ 274 (note) (1970). The 1964 Act provides for an election to receive cash for outstanding valid scrip instead of public land in satisfaction of the scrip claim. All claims for Sioux Half-Breed scrip must have been presented to the Department for satisfaction under this Act by January 1, 1970, or they became null and void. 43 CFR 2610.0-1. 3/

The Secretary of the Interior rejected the application of Preston Nutter Corporation in a final administrative decision of April 29, 1970. The Secretary held that the right to locate Sioux Half-Breed scrip is a personal right not subject to transfer and that Nutter Corporation is not such a person who may succeed to the personal right of the original scrip holder.

Nutter Corporation then filed suit in the United States District Court for the District of Utah, Central Division, seeking a writ of mandamus to compel the Secretary of the Interior to recognize its claim. The District Court granted summary judgment for the Secretary, determining that his decision was supported by substantial evidence in the record.

The District Court's action was upheld on appeal in Preston Nutter Corporation v. Morton, 479 F.2d 696 (10th Cir. 1973). The Court of Appeals for the Tenth Circuit thoroughly reviewed the legal history of Sioux Half-Breed scrip and, in particular, the chronology and the documentation of scrip certificate 567-E

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3/ The Act provides in pertinent part:

"Prior to January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975, any person who has a claim recorded pursuant to the Act of August 5, 1955, by written notice to the Secretary of the Interior, or any officer of the Department of the Interior to whom authority to receive such notice may be delegated, may elect to receive cash instead of public land in satisfaction of his claim, at a rate per acre equal to the average value of the lands offered by the Secretary under section 4 of the Act. Upon a determination that the claim is valid, the Secretary or his delegate shall certify the claim of the Secretary of the Treasury who is authorized and directed to pay the claim out of any money in the Treasury not otherwise appropriated. Acceptance of the money shall constitute a full and complete satisfaction of the claim or holding for which the money is paid: \* \* \*."

involved in Nutter Corporation's application. The Court ruled that the corporation had not presented the necessary documentation to redeem the scrip. The Court found a fatal deficiency in that there had been no proper location of the land in the name of the scribee nor did the Nutter Corporation possess a valid power of attorney to locate and patent lands. Appellant's submission of the application to locate certain undesignated lands, signed by Anna R. Kean, was not deemed sufficient. What was required was a blank power of attorney for someone else to make that location on Kean's behalf.

Citing the most recent case directly in point, Colson v. Udall, 278 F. Supp. 826 (M.D. Fla., 1968), (affirming Barney Colson, 70 I.D. 409 (1963)) aff'd sub nom., Colson v. Hickel, 428 F.2d 1046 (5th Cir. 1971), cert. denied, 401 U.S. 911 (1971), the court discussed at length the nontransferability of the scrip and the body of case law that had evolved from various efforts to circumvent this restriction. The court adhered to the strict formalities to be followed to legitimize the only transfer device that has been recognized by the Department and the courts over the years. The applicant must establish his right to locate lands under the scrip issued to the scribee by presenting (1) a valid power of attorney to first locate and patent land in the name of the scribee and, (2) a blank power of attorney to convey that land in the name of the scribee. Therefore, without both of these specific documents, it was held that the applicant had not established its claim and no cash settlement was justified.

Preston Nutter, after issuance of the Tenth Circuit's ruling, filed additional documents with the BLM on July 10, November 21 and December 12, 1973. These documents included a purported assignment by Preston Nutter to itself of "all rights, interests and authorizations which Anna R. Kean possessed as to Sioux Half-Breed Certificate No. 567-E on behalf of Josette Montre."

The Bureau, in reviewing these documents, determined that the apparent purpose of this purported assignment was solely to satisfy the requirement of the Tenth Circuit Court for a "valid power of attorney." The Bureau reaffirmed its prior rejection of the same scrip application holding that the document received is in the form of a power of attorney, granted by the Corporation to itself, to act on behalf of Josette Montre and Anna R. Kean. The Bureau stated it is impossible to grant powers one does not already possess. The assignment does not create any new rights in Preston Nutter Corporation relative to it being the successor in interest of the above-described certificate. This finding is correct.

On appeal Nutter Corporation argues that no ruling has yet been made on the validity of certificate 567-E. It contends that the processing of the cash redemption has been refused on the basis of alleged precedents which do not deal with the submission of the original certificate, but turn on rulings pertinent only to the location of land and when the certificate is not submitted.

This is a spurious argument at best. Appellant apparently has completely missed the impact of the Court's ruling. It has focused its attention on the certificate itself, rather than the necessary supporting documentation which it has been unable to provide to date. Mere possession of the certificate and timely recording under the Act of August 5, 1955, supra, 4/ in and of itself, does not establish the validity of the claim. 5/ Only an applicant who can properly establish that he has succeeded to the right to locate the lands under the original certificate is entitled to a cash redemption. Appellant has never properly established that it has been empowered to make the locations. The fact that it seeks cash rather than land is of no significance. The burden of proof is the same. Barney Colson, 7 IBLA 40 (1972), review dismissed with prejudice, Colson v. Morton, Civil No. 1960-72 (D.C.D.C., February 7, 1974), aff'd per curiam, No. 74-1479 (D.C. Cir., January 24, 1975).

Appellant has presented nothing with this appeal that remotely qualifies as an appropriate power of attorney to locate the land in the name of the original scrip, Josette Montre. The court in Preston Nutter Corporation v. Morton, supra, spelled out precisely the missing link required to complete the chain of evidence for a successful scrip claim. Such a document, if it existed, is the only credential that will be acceptable within the legal framework recognized by the courts as non-violative of the no-transfer proviso of the 1854 Act.

The BLM has properly disregarded appellant's attempt to create a power of attorney to itself. Where the Corporation does not possess that authority in the first instance, it cannot create that authority through the legal fiction of the subsequent assignment. Further, this is not evidence that was in existence at the time of the filing of its

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4/ This Act requires recordation of assignments of various types of land scrip with the Department within 6 months after the effective date of the assignment. Failure to present the claim for recordation extinguishes the claim. 43 CFR 2610.0-3(2).

5/ Scrip Certificate 567-E was recorded January 14, 1958, at volume 1, page 2 Series Sioux Half-Breed. The acknowledgment of the certificate states "The recordation of the scrip does not certify as to the validity of the attached document or documents."

claim in 1969. Appellant has subsequently created this document dated July 10, 1973, in order to obtain a further reconsideration. It is of no evidentiary value. Where an applicant seeks to assert a scrip claim which has previously been determined to be invalid, and does not submit new or additional evidence, the application is properly rejected. See, e.g., Margaret N. Chivers, 21 IBLA 124 (1975); Ben Cohen, 21 IBLA 330 (1975).

From our review of the record it is clear that appellant has failed to present any new substantial evidence that has not already been considered by this Department in the previous adjudication of its scrip claim. The basis of its claim has in fact received thorough examination by the Department and the courts and has been properly determined insufficient for a cash redemption. In view of the Court's findings on this matter, we find the same inadequacies in appellant's claim as before. These rulings are dispositive of the appeal and the application is properly rejected. Appellant asserts that the filing of the original certificate distinguishes its situation from the others. It does not explain why this is so and we fail to perceive any reason it should require a different result. In any event, neither this case nor the Colson case turned on the validity of the certificate, but only on the applicant's right to exercise it.

Appellant has requested oral argument before the Board. The request for that opportunity is denied. Appellant has already been afforded more than ample opportunity to submit all arguments on appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Bureau of Land Management is affirmed.

Martin Ritvo

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Administrative Judge

I concur:

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Joan B. Thompson  
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

I would grant oral argument in lieu of disposing of the case at this time.

The legal efficacy of appellant's power of attorney to itself to locate the land in the name of the original scribee, Josette Montre, is a novel one in scrip matters and I would welcome an oral exposition of appellant's rationale.

Frederick Fishman

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Administrative Judge

